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No. 89-410

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ANN BROOKE CHRISTENSEN,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
LOUISE T. DOBBE
Special Assistant
Attorney General
Counsel of Record
200 Ford Building
117 University Avenue
St. Paul, Minnesota 55155
Telephone: (612) 296-7575
ROGER J. FELLOWS
Assistant City Attorney
City of Brooklyn Park
1100 First Bank Place West
Minneapolis, Minnesota 55402
Telephone: (612) 338-4200
Counsel for Respondent

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QUESTION PRESENTED

Whether the State appellate court below correctly ruled that Minn. Stat. §§ 152.01, subd. 18 and 152.093 (the definition of drug paraphernalia and the misdemeanor offense of possession of drug paraphernalia for delivery) do not suffer from constitutional vagueness under the Fourteenth Amendment to the United States Constitution, applying the standards of *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)?

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The respondent, State of Minnesota, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Minnesota Court of Appeals' opinion in this case. That opinion is reported at 439 N.W.2d 389.

JURISDICTION

Petitioner's jurisdictional statement cites 28 U.S.C. § 1257 (1) as supportive of her attempt to invoke the jurisdiction of this Court. However, this is clearly an error because 28 U.S.C. § 1257(1) grants review in appeals involving federal statutes or treaties. Petitioner obviously meant to cite 28 U.S.C. § 1257 (3) as her basis for jurisdiction, since this case involves a question of the validity of a State statute in regard to the United States Constitution. The amended statute, 28 U.S.C. § 1257(a) (Public Law 100-352), does not obtain because the judgment of the trial court was entered before September 25, 1988, the effective date of the amendment.

STATUTES INVOLVED

Minn. Stat. § 152.093 (1982) reads:

> It is unlawful for any person knowingly or intentionally to deliver drug paraphernalia or knowingly or intentionally to possess or manufacture drug paraphernalia for delivery. Any violation of this section is a misdemeanor.

Minn. Stat. § 152.01, subd. 18 reads:

> "Drug paraphernalia" means all equipment, products, and materials of any kind, except those items used in conjunction with permitted uses of controlled substances under this chapter or the Uniform Controlled Substances Act, which are knowingly or intentionally used primarily in (1) manufacturing a controlled substance, (2) injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, (3) testing the strength, effectiveness, or purity of a controlled substance, or (4) enhancing the effect of a controlled substance.

STATEMENT OF THE CASE

On September 1, 1987, a Brooklyn Park, Minnesota Police Department detective visited the business establishment known as "In Zane Limited" located on Zane Avenue North in Brooklyn Park, Minnesota. The detective observed several kits, commonly known as cocaine kits, in a display case priced for sale. The detective examined one and found it contained a mirror, a razor blade, an empty vial, and a small metal tube used to ingest cocaine by inhaling. The detective purchased the kit and returned to the police department.

He then consulted with the city attorney to ascertain whether the sale of the cocaine kit was contrary to Minn. Stat. § 152.093. Based upon the opinion of the city attorney, the detective applied for and was issued a search warrant to seize drug paraphernalia and manufacturers' invoices at the In Zane store. The search warrant was obtained and executed on September 17, 1987 at which time 118 cocaine kits were removed along with 13 glass snorter tubes, 20 metal alloy snorter tubes, 75 assorted snorter tubes and one leather pouch containing a plastic bag in which a quantity of unknown crystals was found. Numerous other items on display which are associated with drug usage were not seized under the warrant.

At the time the warrant was executed, officers asked the store employee "Where's the cocaine stuff?" The employee pointed to and brought the police officers to the display case located on the north side of the store where the above-mentioned seized items were located.

The petitioner was charged by summons and complaint in the Hennepin County District Court with the offense of possessing drug paraphernalia for delivery, a misdemeanor, in connection with operating the "In Zane" store.

The trial court dismissed the complaint on the grounds that both Minn. Stat. §§ 152.093 and 152.01, subd. 18 are unconstitutionally vague on their face and as applied. In *State v. Christensen*, 439 N.W.2d 389 (Minn. Ct. App. 1989) the Minnesota Court of Appeals reversed the decision of the trial court and remanded the case for trial, finding that neither statutory section suffers from constitutional vagueness after applying the standards set forth in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). Petitioner herein filed a Petition for Review in the Minnesota Supreme Court, which was denied by an Order dated June 9, 1989.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION.

The writ should be denied in this case because there exist no "special and important reasons" for the exercise of this Court's discretionary power of review. U.S. Sup. Ct. Rule 17.1. As the following argument will show, the Minnesota Court of Appeals correctly decided the vagueness challenge to the drug paraphernalia statutes herein. The question was settled by this Court in 1982 in *Village of Hoffman Estates v. Flipside, Hoffman Estates, supra.* The Minnesota Supreme Court recognized that the Court of Appeals had correctly applied the established precedent to the vagueness challenge and properly denied further review.

II. THE MINNESOTA COURT OF APPEALS CORRECTLY APPLIED THE STANDARDS OF *HOFFMAN ESTATES* IN ITS ANALYSIS OF THE VAGUENESS CHALLENGE.

The Minnesota Court of Appeals reviewed the trial court's memorandum to ascertain whether the proper standards regarding a vagueness challenge had been applied. It found that the trial court erroneously relied on the analysis used in an Oregon appellate court case, *Gaffey v. Babb*, 50 Or. App. 617, 624 P.2d 616, *rev. denied*, 291 Or. 117, 631 P.2d 341 (1981). It also found that *Gaffey* lacked any precedential value and was distinguishable on its facts. The Minnesota Court of Appeals noted:

> Furthermore, the trial court's memorandum does not reflect consideration of *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). We hold that *Hoffman* controls the decision here.

Christensen, 439 N.W.2d at 391.

After a thorough review of *Hoffman*, the two paraphernalia statutes in question were analyzed to determine if reasonable persons had notice of the type of conduct prohibited by the statutes. In *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971), this Court held that a statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."

The Court of Appeals found that Minnesota's statutes provide the constitutionally required notice which affords due process:

> Under the statutes, a fact finder could reasonably find that the items seized are 'products * * * which are knowingly or intentionally used primarily' in ingesting illegal substances.

Christensen, 439 N.W.2d at 393.

The appellate court also reviewed the challenge to the statute "as applied" to determine whether sufficient enforcement standards are provided for law enforcement and the courts. It stated:

> Like *Hoffman*, here there is a lack of evidence indicating that the statute has been or will be discriminatorily enforced.

Christensen, 439 N.W.2d at 393.

On its face and as applied, Minn. Stat. § 152.093 (and § 152.01, subd. 18 by reference) dictate an ascertainable standard of conduct by which reasonable persons may conduct their affairs. Common household items with legitimate purposes are not covered by these statutes.

The Minnesota Court of Appeals determined that as applied, the cocaine kits and snorter tubes seized clearly fall within

the statutory definition of objects "used primarily" for drug consumption. The statutes also require the prosecution to prove that petitioner knowingly and intentionally possessed the paraphernalia for delivery. The scienter requirement relates to petitioner, and not to the intent of the customer who purchases the drug paraphernalia.

The term "used primarily" in the definition of drug paraphernalia, Minn. Stat. § 152.01, subd. 18, pertains to the general market of consumers for whom the items are designed, manufactured and marketed. The retailer need not know how an individual consumer intends to use the item. Rather, the retailer must know that the primary usage of the equipment by the general public or by a select group of the public, is for the illegal ingestion of controlled substances.

By the marketing and packaging of individually generic items together, the retailer has provided a product which only the drug user finds attractive as inherently suited for drug use. The analysis of the "designed . . . for use" definition in *Hoffman Estates* recognized that the standard encompasses an item which is "principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer. A business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer." *Hoffman*, 455 U.S. at 501.

The cocaine kits which were seized from petitioner were a configuration of a mirror, a razor, a tiny spoon, an empty vial and a small hollow tube as one item on display for sale. The marketing of these items together made the kits inherently suited only for drug use, and a business person of ordinary intelligence would know that such equipment is "used primarily" for the illegal ingestion of controlled substances.

III. THE MINNESOTA COURT OF APPEALS CORRECTLY RECOGNIZED THAT THE MODEL ACT IS NOT A PREREQUISITE TO FINDING THE STATUTES CONSTITUTIONAL.

Petitioner has consistently argued that because Minnesota's statutes are not modeled after the 1979 Department of Justice Model Drug Paraphernalia Act, they should be declared unconstitutional. However, the Minnesota Court of Appeals correctly stated:

> However, we hold that a statute need not be based on the Model Act to be found constitutional, it merely must meet the standard set forth in *Hoffman.*

Christensen, 439 N.W.2d at 392.

Several state paraphernalia statutes and ordinances which are not patterned on the Model Drug Paraphernalia Act have been found to be facially constitutional. *Hoffman,* of course, is the leading non-Model Act case. *See also High Ol' Times v. Busbee,* 673 F.2d 1225 (11th Cir. 1982); *Gasser v. Morgan,* 498 F. Supp. 1154 (N.D. Ala. 1980); *People v. Taylor,* 70 Misc. 2d 970, 335 N.Y.S.2d 324 (1972). Therefore, to argue that because Minnesota's drug paraphernalia statutes are not exact replicas of the Model Act they should be ruled unconstitutional is totally without substance or precedent.

Petitioner claims the decision of the Minnesota Court of Appeals conflicts with decisions of the Federal Courts of Appeals and other courts, yet fails to indicate the alleged conflict with any specificity. The Minnesota Court of Appeals correctly recognized that the appropriate standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford,* 408 U.S. 104 (1972) and applied in *Hoffman.* The Minnesota Court of Appeals determined that adequate notice to the

public was provided and discriminatory enforcement did not occur in this case when it applied the *Grayned* standards.

Additionally, the Minnesota Court of Appeals looked to a scienter requirement to mitigate any vagueness as to what conduct is proscribed by the phrase "intentionally used primarily" in the Minnesota definition of drug paraphernalia. This analysis followed the reasoning used in *Hoffman* to examine the phrase "designed or marketed for use" in the Illinois definition of paraphernalia. Minnesota's holding comports with federal appeals courts which have examined a variety of non-model act definitional phrases and found they withstand constitutional challenge: "used or intended for use" in *Murphy v. Matheson*, 742 F.2d 564 (10th Cir. 1984); "intends to be used primarily for" in *Nova Records, Inc. v. Sendak*, 706 F.2d 782 (7th Cir. 1983); "primarily intended" in the 1978 statute and "designed or marketed as useful primarily" in the 1980 statute in *High Ol' Times v. Busbee*, 673 F.2d 1225 (11th Cir. 1982); "primarily adapted, designed, and intended for" in *Hejira Corp. v. MacFarlane*, 660 F.2d 1356 (10th Cir. 1981).

Petitioner does not and cannot support the claim that the Minnesota Court of Appeals has failed to follow the analysis of *Hoffman* which it recognized as the controlling authority in this case.

CONCLUSION

The Minnesota Court of Appeals applied the *Hoffman* standards correctly to find that Minn. Stat. §§ 152.01, subd. 18 and 152.093 provide sufficient specificity of what is illegal to possess or sell as drug paraphernalia.

Based upon the facts presented, their finding that there was no evidence of discriminatory enforcement was also correct. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
LOUISE T. DOBBE
Special Assistant
Attorney General
200 Ford Building
117 University Avenue
St. Paul, Minnesota 55155
Telephone: (612) 296-7575
ROGER J. FELLOWS
Assistant City Attorney
City of Brooklyn Park
1100 First Bank Place West
Minneapolis, Minnesota 55402
Telephone: (612) 338-4200
Counsel for Respondent